

***IN THE SUPREME COURT***

Appeal from the Michigan Court of Appeals  
Donofrio, PJ, and Zahra and Kelly, JJ

**JOANNE ROWLAND,**

Plaintiff-Appellee,

v

**WASHTENAW COUNTY ROAD COMMISSION,**

Defendant-Appellant,

-and-

**NORTHFIELD TOWNSHIP,**

Defendant.

Supreme Court Docket No. **130379**

Court of Appeals Docket No. 253210

Washtenaw County Circuit Court  
Case No. 03-128-NO

**DEFENDANT-APPELLANT WASHTENAW COUNTY  
ROAD COMMISSION'S BRIEF ON APPEAL**

**ORAL ARGUMENT REQUESTED**

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## INTRODUCTION

This appeal presents three issues. First, should this Court overrule the requirement of *Hobbs v State Hwy Dep't*, 398 Mich 90; 247 NW2d 754 (1976), that a defendant show actual prejudice before claiming dismissal for lack of timely notice pursuant to MCL 691.1404. Second, if this Court declines to overrule *Hobbs*, whether the untimely "attorney retention" letter sent to the defendant-appellant by plaintiff's counsel was adequate to satisfy the substantive requirements for a notice contained in MCL 691.1404. Lastly, whether the lower courts properly identified a genuine issue of material fact concerning whether the alleged highway defect existed within the improved portion of the highway designed for vehicular travel, so as to implicate the highway exception to governmental immunity found at MCL 691.1402.

For the reasons and authorities discussed in this brief, the defendant-appellant Washtenaw County Road Commission respectfully requests that this Court **REVERSE** the decisions of the lower courts denying summary disposition to the defendant.

## **STATEMENT OF THE BASIS OF JURISDICTION**

The Washtenaw County Circuit Court entered an Order, signed by the Honorable David Scott Swartz, denying summary disposition to the defendant Road Commission on December 22, 2003. Defendant filed a timely Claim of Appeal on January 6, 2004. The Court of Appeals had jurisdiction pursuant to MCR 7.203(A)(1) and MCR 7.202(6)(a)(v).

The Court of Appeals issued its Opinion and Order on December 13, 2005. Defendant-appellant filed a timely Application for Leave to Appeal with this Court within 42 days after the Court of Appeals decision. This Court granted defendant-appellant's Application for Leave to Appeal by Order entered on March 31, 2006. Therefore, this Court has jurisdiction pursuant to MCR 7.301(A)(2).

## STATEMENT OF QUESTIONS INVOLVED

- I. **SHOULD THE RULE OF *HOBBS v STATE HWY DEP'T*, 398 MICH 90; 247 NW2d 754 (1976), REQUIRING THAT A DEFENDANT SHOW ACTUAL PREJUDICE PRIOR TO CLAIMING DISMISSAL FOR LACK OF TIMELY NOTICE PURSUANT TO MCL 691.1404, BE OVERRULED?**

Defendant-appellant says, "Yes."

Plaintiff-appellee will say, "No."

Court of Appeals Judges Donofrio and Zahra concluded that they were duty bound to follow the *Hobbs* Court's construction of MCL 691.1404.

Court of Appeals Judge Kelly, in concurrence, agreed that *Hobbs* was binding precedent, but expressed her view that it was wrongly decided.

The Circuit Court applied the *Hobbs* actual prejudice requirement.

- II. **ALTERNATIVELY, WAS THE UNTIMELY "ATTORNEY RETENTION" LETTER SENT BY PLAINTIFF'S COUNSEL ADEQUATE NOTICE PURSUANT TO MCL 691.1404, DESPITE ITS FAILURE TO "SPECIFY THE EXACT LOCATION AND NATURE" OF THE DEFECT, THE INJURIES SUSTAINED, AND THE NAMES OF WITNESSES KNOWN AT THE TIME BY THE CLAIMANT?**

Defendant-appellant says, "No."

Plaintiff-appellee will say, "Yes."

The Court of Appeals said, "Yes."

The Circuit Court said, "Yes."

- III. **IS THERE A GENUINE ISSUE OF MATERIAL FACT CONCERNING WHETHER THE ALLEGED DEFECT EXISTED WITHIN THE IMPROVED PORTION OF THE HIGHWAY DESIGNED FOR VEHICULAR TRAVEL, AS REQUIRED BY MCL 691.1402?**

Defendant-appellant says, "No."

Plaintiff-appellee will say, "Yes."

The Court of Appeals said, "Yes."

The Circuit Court did not address the issue.

## STATEMENT OF FACTS

### I. NATURE OF THE PLAINTIFF'S CLAIM

Plaintiff claims that she was injured when she fell while taking her regular morning walk on February 6, 2001. (Appx at 57a-59a). She testified that her walk would take her past Jennings Street, where she would turn around and walk back north along Main Street and cross Jennings Street once again. (Appx. at 57a-59a). On the date of her injury, there was ice along the road. (Appx at 34a). The low temperature for the day was 28.4° Fahrenheit; the high temperature was 33.8° Fahrenheit. (Appx at 22a-23a).

On the return portion of her walk, in the vicinity of Main Street and Jennings Street, Ms. Rowland fell. In her answers to interrogatories, she described the incident: "I was returning home after my morning walk . . . when I was suddenly on the ground . . . ." (Appx at 25a).

The Northfield Township Fire Department responded to the scene. When they arrived, Ms. Rowland was lying on her left side on the southwest corner of Main Street and Jennings Street. (Appx at 28a). She indicated to the responders that she had been walking and slipped on ice and heard a snap from her right ankle. (Appx at 28a, 30a, 32a). An ambulance subsequently arrived on the scene with Emergency Medical Technician Rebecca Grill.<sup>1</sup> Ms. Grill's EMT report indicates that Ms. Rowland said she was walking and hit a patch of ice and fell. (Appx at 30a). Ms. Rowland was then transported to St. Joseph Mercy Hospital for treatment. (Appx at 28a).

On June 26, 2001—140 days after the incident—plaintiff's counsel sent what can be described as "notice of retention" to the Washtenaw County Road Commission. That letter stated:

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<sup>1</sup> Ms. Grill is now known as Rebecca Jackson.

Please be advised that I have been retained by Mr. [sic] Joanne Rowland to investigate and evaluate a claim for personal injuries that arose out of an incident that occurred on February 6, 2001. This incident occurred at the intersection of Jennings and Main Street in Northfield Township, County of Washtenaw, State of Michigan. Please be advised that I will continue my investigation, and if the same is warranted, will pursue a claim for money damages against the responsible agency for jurisdiction of this roadway. If I do not hear from you within the near future, I will be forced to place this matter into litigation.

(Appx at 42a).

In July 2001, shortly after the "retention letter" was sent, the intersection of Main Street and Jennings Street in Northfield Township was resurfaced. (Appx at 19a).

Plaintiff filed her lawsuit on February 5, 2003, alleging that a hole located in the "shoulder crosswalk" on Jennings Road caused her fall. (Complaint at ¶¶ 5-6). The Road Commission moved for summary disposition, arguing, among other things, that the plaintiff's notice was untimely and inadequate to satisfy MCL 691.1404, and that the area where plaintiff fell was outside the improved portion of the highway designed for vehicular travel. (Appx at 9a-42a).

At the hearing on November 19, 2003, the Circuit Court denied the Road Commission's motion in its entirety, finding instead that the content of the retention letter provided "adequate" notice, and further finding a genuine issue of material fact as to whether "actual prejudice" had been shown:

The Court while finding that the content of the notice was adequate, the Court does find genuine issues of material fact regarding whether the Defendant suffered actual prejudice as a result of the admitted late notice. For the reasons stated by the Plaintiff in their brief and on the record, the Defendant's motion is denied.

(Appx at 91a-99a).

Defendant appealed as of right. (Appx. at 101a-126a).<sup>2</sup> After argument, the Court of Appeals issued an Opinion and Order concluding that although the plaintiff's purported notice was untimely, the Court was bound to apply the "actual prejudice" requirement imposed by *Hobbs v Michigan State Highway Dep't*, 398 Mich 90, 96; 247 NW2d 754 (1976) and reaffirmed by *Brown v Manistee Co Rd Comm*, 452 Mich 354, 356-357; 550 NW2d 215 (1996). The Court of Appeals additionally concluded that the substance of the purported notice satisfied the statutory requirements of MCL 691.1404. Finally, the Court confirmed the Circuit Court's conclusion that a genuine issue of material fact exists as to whether the plaintiff's injury was caused by a defect within the improved portion of the highway designed for vehicular travel. (Appx at 143a-145a). Judge Kelly concurred with the result, but wrote separately to note her agreement with the defendant that *Brown* and *Hobbs* were wrongly decided. (Appx. at 146a).

This Court granted the defendant's Application for Leave to Appeal by Order dated March 31, 2006, specifically ordering the parties to address whether any change in the law should be made prospectively only, and additionally, the effect that *stare decisis* should have on the decision.

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<sup>2</sup> As a matter of efficiency, the Court of Appeals briefs included in the Appellant's Appendix are without their original attachments, as those would be duplicative of the attachments to the Circuit Court briefs.

## ARGUMENT

### I. THIS COURT SHOULD OVERRULE THE HOLDING OF *HOBBS v STATE HIGHWAY DEP'T*, 398 MICH 90; 247 NW2d 754 (1976), REQUIRING A DEFENDANT TO SHOW ACTUAL PREJUDICE BEFORE CLAIMING DISMISSAL FOR LACK OF TIMELY NOTICE

#### A. Standard Of Review

The question presented here involves an issue of statutory interpretation. Matters of statutory interpretation are subject to *de novo* review. *Stozicki v Allied Paper Co*, 464 Mich 257, 263; 627 NW2d 293 (2001). Moreover, the issue presented here is a pure question of law which receives *de novo* review, as well. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991). Finally, the trial court's grant or denial of summary disposition is reviewed *de novo*. *Stone v Michigan*, 467 Mich 288, 291; 651 NW2d 46 (2002).

#### B. Summary

As a condition to recovery pursuant to the highway exception, MCL 691.1402, a plaintiff must comply with the written notice requirement of MCL 691.1404, which requires a competent adult to provide notice within 120 days of the injury. The plaintiff in this case did not provide timely notice. Notwithstanding this failure, the Road Commission was denied summary disposition based on the lower courts' conclusions that they were bound by this Court's precedent in *Hobbs v State Highway Dep't*, 398 Mich 90; 247 NW2d 754 (1976) requiring that a defendant show actual prejudice before claiming dismissal based on untimely notice.

The rule of *Hobbs* must be overturned. It is contrary to the plain and unambiguous language of the statute, which contains no prejudice requirement. It is inconsistent with this Court's subsequent seminal governmental immunity case, *Ross v Consumers Power*, 420 Mich 567; 363 NW2d 641 (1984) and cases which reaffirm *Ross*. It has no valid constitutional

underpinning. To the contrary, the notice requirement serves the valid government interests of ensuring prompt notice of a potential claim, thereby allowing the defendant to investigate and preserve evidence for its defense, as well as to lock the plaintiff in to a particular theory of liability. The prejudice requirement of *Hobbs* is an example of judicial legislation that must be corrected. *Stare decisis* does not impede its reversal, and pursuant to this Court's retroactivity jurisprudence, any change in the law should be retroactive.

C. **The Road Commission Is Immune From All Tort Liability Except As Provided In A Narrowly Drawn Statutory Exception, Which Requires, As A Condition To Recovery, That A Competent Adult Plaintiff Have Given Notice Within 120 Days From The Injury.**

The issue presented to this Court requires it to revisit its earlier interpretation of the statutory notice requirement contained in MCL 691.1404, which is a precondition to a claim of liability against a governmental agency for an alleged highway defect. To be viable, the plaintiff's claim must come within the "highway exception" to governmental immunity. As a precondition to any recovery pursuant to that exception, however, the claimant must give notice of the claim within 120 days of the injury.

The legislative command concerning governmental immunity is clear:

Except as otherwise provided in this Act, all governmental agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise or discharge of a governmental function . . . .

MCL 691.1407(1).

This grant of immunity "is expressed in the broadest possible language." *Ross v Consumers Power (on rehearing)*, 420 Mich 567, 618; 363 NW2d 641 (1984). The Legislature has commanded that the defendant "shall be immune" from "tort liability" in "all cases" arising from the exercise or discharge of a "governmental function."

The only potential exception to tort immunity applicable in this case is the highway exception. MCL 691.1402. As a condition to recovery in a case brought pursuant to the highway exception, notice within a certain time is statutorily mandated:

**691.1404. Notice of injury and defect in highway.**

Sec. 4. (1) As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

MCL 691.1404(1).

Therefore, the statute states in plain and unambiguous language that a prerequisite to any recovery for injuries sustained by any highway defect is to provide the statutorily required notice within 120 days.

**D. In *Hobbs v State Highway Dep't*, This Court Added To The Statutory Language By Making The Notice Provision Applicable Only When The Defendant Proves It Has Actually Been Prejudiced By Late Notice.**

Until 1972, this Court and the Court of Appeals consistently enforced statutory notice provisions as written.<sup>3</sup> However, in *Reich v State Highway Dep't*, 386 Mich 617; 194 NW2d

<sup>3</sup> For many decades, this Court consistently enforced mandatory notice statutes as enacted, without judicial modification. This Court recognized a sound policy and purpose of the notice provisions, including not only the necessity for prompt investigation, but also committing the plaintiff to a description of the "defect." *Barribeau v Detroit*, 147 Mich 119; 110 NW 512 (1907) ("the requirement that a notice be given is not alone for the purpose of affording the officers of the city opportunity for investigation. It is also for the purpose of confining the plaintiff to a particular 'venue' of the injury"); *Ridgeway v Escanaba*, 154 Mich 68; 117 NW 550 (1908) ("it is a just law, necessary to the protection of the taxpayer, who bears the burden of unjust judgments. It requires only ordinary knowledge and diligence on the part of the injured and his counsel, and there is no reason for relieving them from the requirements of this statute that would not be applicable to any other statute of limitation."); *Hughes v Detroit*, 336 Mich 457; 58 NW2d 144 (1953); *Overton v Detroit*, 339 Mich 650; 64 NW2d 574 (1954); *Rottschafer v East Grand Rapids*, 342 Mich 43, 51; 69 NW2d 193 (1955) ("in our opinion, there was a fatal variance between plaintiff's statutory notice of her accident to defendant city and the declaration

700 (1972), this Court invalidated the 60-day notice provision contained in MCL 224.21(3). The majority in *Reich* concluded that the 60-day notice provision violated equal protection guarantees of the state and federal constitutions. The majority based this conclusion upon the unfounded assumption that the Legislature, where it waived immunity in certain circumstances, intended to treat victims of governmental tortfeasors the same as victims of private tortfeasors. The Court held that the 60-day notice provision arbitrarily, and thus improperly, barred actions by victims of governmental torts, while similar nongovernmental claims would not be barred. The Court therefore concluded that "the notice provision is void and of no effect." *Reich*, 386 Mich at 624.

Four years later, this Court revisited the notice issue in *Hobbs v State Highway Dep't*, 398 Mich 90; 247 NW2d 754 (1976); *Kerkstra v Hwy Dep't*, 398 Mich 103; 247 NW2d 759 (1976); and *Appel v Dep't of State Hwys*, 398 Mich 110; 247 NW2d 762 (1976). The *Hobbs* majority shunned the equal protection argument.<sup>4</sup> However, the majority noted that the 120-day notice provision at issue in *Hobbs* was not the same as the 60-day notice provision at issue in *Reich*. Thus, the *Hobbs* Court concluded that the *Reich* holding did not control the question presented there.

Having distanced itself from *Reich*, this Court gave an independent, but nevertheless cursory, analysis of the 120-day notice provision. Implicitly rejecting *Reich*, the four-member

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and proofs in her subsequent action against the city."); *Boike v Flint*, 374 Mich 462; 132 NW2d 658 (1965); *Melvin v Monroe*, 329 Mich 426, 430; 45 NW2d 347 (1957); *Braun v Wayne*, 303 Mich 454, 457-458; 6 NW2d 744 (1942); *Trbovich v Detroit*, 378 Mich 79; 142 NW2d 696 (1966); *Kowalczyk v Bailey*, 379 Mich 568; 153 NW2d 660 (1967).

<sup>4</sup> Cases from other jurisdictions consistently recognize that *Reich's* constitutional analysis represents, "a distinct minority view." *Johnson v Maryland State Police*, 331 MD 285, 293; 628 A2d 162, 166 (1991). In *Newlan v State*, 96 Idaho 711; 535 P2d 1348, 1352 (1975), the Idaho Supreme Court observed:

We find the opinion in *Reich* to be highly conclusory without any consideration of the rationale for such notice statute, nor any real analysis of the equal protection problem.

majority said that notice provisions are not necessarily unconstitutional. But they then grafted an actual prejudice precondition onto the notice provision, despite that no such language appears in the statute:

Because actual prejudice to the state due to lack of notice within 120 days is the only legitimate purpose we can posit for this notice provision, absent a showing of such prejudice the notice provision contained in MCLA 691.1404; MSA 3.996 (104) is not a bar to claims filed pursuant to MCLA 691.1402; MSA 3.996 (102).

*Hobbs*, 398 Mich at 96.

Unfortunately, this Court did not explain the constitutional basis upon which it relied. Clearly, however, the Court was not relying upon equal protection as it had done previously in *Reich*. Whatever constitutional rationale was involved, the Court seemed to have borrowed its analysis from the earlier decision in *Carver v McKernan*, 390 Mich 96; 211 NW2d 24 (1973).

In *Carver*, the Court had addressed a notice provision found in the Motor Vehicle Accident Claims Act. The Court “declined to declare” the notice requirement unconstitutional. Instead, the Court held that the statute could only be applied “upon a showing of prejudice.”

In *Carver* and *Hobbs*, this Court stated that legislation must have a legitimate purpose, and that the legitimate purpose for a notice provision is to prevent prejudice to the defendant. The Court made leap from there, however, by concluding that this legislative purpose requires the defendant to demonstrate not only noncompliance with the statute, but that noncompliance actually prejudiced investigation and defense of the claim. Short of that, this Court concluded that the notice requirement could not be applied.

Justice Coleman wrote a dissenting opinion in *Hobbs*. She stated, first, that the *Reich* analysis had been entirely incorrect:

The greater problem in this case is with *Reich* itself. The conclusion that the legislation waiving immunity put “[governmental tortfeasors] on an equal footing with private tortfeasors” is not correct. 386 Mich 623.

The theory of governmental immunity shields the state from liability unless the Legislature provides differently. 1964 PA 170, as amended, was designed "to make uniform the liability of \* \* \* the state, its agencies and departments, when engaged in the exercise or discharge of a governmental function, for injuries to property and persons." The legislation was designed "to define or limit such liability." Unlike private tortfeasors, the state has to consent to be sued.

In surrendering some of the state's immunity, the Legislature imposed restrictions. The claim must be brought in the Court of Claims. There is a two-year statute of limitations for claims alleging that injuries resulted from a defective highway. The Legislature also required that the governmental agency be notified of such claims "within 120 days from the time the injury occurred."

We do not believe this legislation was intended to put governmental tortfeasors on an equal footing with private ones. The objective was to make uniform the liability of governmental units. The act defines and limits liability. It lifts the state's immunity only for certain injuries. It describes how claims concerning these injuries are to be processed. It prescribes that a legislatively created forum will adjudicate the claim.

*Hobbs*, 398 Mich at 99-100.

Justice Coleman went on to disagree with the majority in the following respect. She said that the statute should be applied as written, without any judicial modifications or revisions. Her analysis closely parallels this Court's current approach to governmental immunity, as discussed below. The remedy, she concluded, is purely statutory:

... The Legislature has permitted suits where none were allowed as a right. The 120-day notice provision is a reasonable condition on that permission.

*Hobbs*, 398 Mich at 102.

For the reasons discussed more fully below, this Court should reject the *Hobbs* majority holding in favor of a reading of the notice statute faithful to its plain and unambiguous language. The *Hobbs* majority decision is not in line with this Court's recent jurisprudence recognizing the legitimate role of the Legislature in structuring the scope of governmental immunity and the exceptions to it. The majority decision in *Hobbs* wrongfully invaded a legislative province of requiring notice as a condition to recovery, and of determining the length of time within which

notice will be permitted. There is no reason, constitutional or otherwise, why the Legislature is without authority to impose a certain time limit for notice, and further to determine that prejudice most likely occurs unless notice is given within that time limit. *Hobbs* is simply wrong to conclude otherwise, and this Court should correct that error by rejecting *Hobbs* and announcing here that the statute will be applied as written.

E. The Notice Provision Contained In MCL 691.1404 Of The Governmental Tort Liability Act Should Be Applied As Written, Contrary To *Hobbs*.

1. The Notice Provision is Clearly Stated, Without Ambiguity.

There is no ambiguity in the language of the notice provision. It is plainly stated:

As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3), shall serve a notice on the governmental agency of the occurrence of the injury and the defect . . . .

MCL 691.1404.

Notice is a "condition to any recovery." Notice "shall" be served "within 120 days from the time the injury occurred." This language contains no exceptions and perfectly reflects the Legislature's clear intent in simple and straightforward language.

2. Judicial Construction of Plainly Stated and Unambiguous Statutory Language is Unnecessary and, Therefore, Not Permitted.

The primary rule of statutory interpretation is that a court must effect the intent of the Legislature. *Wickens v Oakwood Health Care Sys*, 465 Mich 53, 60; 631 NW 2d 686 (2001). To fulfill this responsibility, a court first must examine the statute's language. *Id* If that language is clear and unambiguous, the court must assume that the Legislature intended its plain meaning, and the statute is enforced as written. *People v Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001).

In *Arrigo's Fleet Sys, Inc v State of Mich*, 125 Mich App 790, 792; 337 NW2d 26 (1983), the Court of Appeals relied upon earlier Supreme Court precedent and concluded that there may be no judicial construction of plainly stated legislation:

It is perhaps the most fundamental rule of statutory construction that the Legislature must be presumed to have intended the plain meaning of the words used in the statute and that when the meaning of the words used is clear and unambiguous, judicial construction or interpretation which changes that meaning is not permitted. *MacQueen v Port Huron City Comm*, 194 Mich 328, 342; 160 NW 627 (1916).

This principle of construction applies, even if the Court might think that the Legislature intended something other than what it has stated in the statute. In *George v Int'l Breweries, Inc*, 1 Mich App 129, 132; 134 NW2d 381 (1965), the Court said:

We decline to read into Section 45 a meaning other than that expressed by its language. We follow the rule of law frequently quoted from *People v Lowell* (1930), 250 Mich 349, 359: "Even though the court should be convinced that some other meaning was really intended by the law-making power, and even though the literal interpretation should defeat the very purposes of the enactment, still the explicit declaration of the legislature is the law, and the courts must not depart from it."

*Id.* at 792. See also, *Lorencz v Ford Motor Co*, 439 Mich 370, 376-377; 483 NW2d 844 (1992) ("When a statute is clear and unambiguous, judicial construction or interpretation is unnecessary and therefore, precluded . . .").

This rule of construction applies to the notice statute at issue in this case. The provision is clearly stated. It needs no interpretive gloss. The statute requires, *as a condition of recovery*, that the plaintiff "shall"<sup>5</sup> give notice within 120 days of the injury. There is simply no need for the Court to add to the language of the statute, and it should be applied as written.

<sup>5</sup> The term "shall" is not ambiguous. *Browder v Int'l Fidelity Ins*, 413 Mich 603, 612; 321 NW2d 668 (1982) ("[T]he presumption is that 'shall' is mandatory.")

3. *Ross v Consumers Power* Endorsed Strict Construction of the Governmental Tort Liability Act, Faithful to the Statutory Language.

In *Ross v Consumers Power*, 420 Mich 567; 363 NW2d 641 (1984), this Court provided a comprehensive analysis of the Governmental Tort Liability Act. Consistent with the rule of construction discussed above, it followed a process of statutory interpretation which was “faithful to the statutory language and legislative intent.” *Ross*, 420 Mich at 596.

The Court recognized the authority of the Legislature to provide governmental immunity for all torts. The “heart” of the governmental immunity statute was to provide “broad immunity from tort liability” to all governmental agencies. *Ross*, 420 Mich at 618. The “clear legislative judgment” was that “public and private tortfeasors should be treated differently.” *Ross*, 420 Mich at 618.

The exceptions to governmental immunity, said this Court, are “narrowly drawn.” Significantly, the Court recognized that the broad scope of immunity was drafted by the Legislature specifically to avoid the “value judgments” of the “judiciary.” *Ross*, 420 Mich at 617. This Court concluded:

In contrast [to the judicial definitions of governmental functions] the immunity from tort liability provided by section 7 is expressed in the broadest possible language—it extends immunity to *all* governmental agencies for *all* tort liability *whenever* they are engaged in the exercise or discharge of a governmental function. This broad grant of immunity, when coupled with the four narrowly drawn statutory exceptions, suggest that the Legislature intended that the term “governmental function” be interpreted in a broad manner.

*Ross*, 420 Mich at 618 (emphases in original).

The Court did not question the authority of the Legislature to provide immunity from all torts. Indeed, the Court specifically adopted an approach consistent with legislative intent: “To ensure that governmental agencies retain the full extent of immunity from tort liability which the Legislature intended.” *Ross*, 420 Mich at 625. In the words of this Court:

We have adopted this approach because we believe that this is the result envisioned by the enactors of the Governmental Immunity Act.

*Ross*, 420 Mich at 621. Further, the Court recognized:

that our case law on these questions is confused, often irreconcilable, and of little guidance to the bench and bar. We have made great efforts to reexamine our prior collective and individual views on this subject in order to formulate an approach which is faithful to the statutory language and legislative intent. Wherever possible and necessary, we have reaffirmed our prior decisions. The consensus which our efforts produce today should not be viewed as this Court's individual or collective determinations of what would be most fair or just or the best public policy. The consensus does reflect, however, what we believe the Legislature intended the law to be in this area.

*Ross*, 420 Mich at 596.

*Ross* is a studied and obvious retreat from "judicial legislation."<sup>6</sup> The Court said that the Legislature had the authority to provide "broad" immunity with narrowly drawn exceptions. The terms and conditions of these exceptions, it concluded, must be faithfully applied.

As recognized in *Hadfield in Oakland Co Drain Comm'r*, 430 Mich 139, 153; 422 NW2d 205 (1988):

*Ross* redefined the entire governmental immunity landscape [so that] we are compelled at this point to analyze the issue in a fresh light.

*Id.* at 153.

The plain and simple application of the notice statute is compelled by "an approach which is faithful to the statutory language and Legislative intent." *Ross*, 420 Mich at 618. Under *Ross*, the focus is not on what is the "favored" public policy, but on the legislative intent and explicit statutory language. *Ross*, 420 Mich at 596. Clearly, it was the legislative intent that "public and private tortfeasors should be treated differently." *Ross*, 420 Mich at 618.

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<sup>6</sup> Appropriately, the phrase "judicial legislation" was used by the dissenting opinion in *Carver v McKernan*.

The Court's focus on the statutory language, and retreat from common law modifications, has been repeatedly emphasized in more recent case law. Perhaps the best example<sup>7</sup> of this is found in *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158-159; 615 NW2d 702 (2000) (consolidated with *Evens v Shiawassee Co Rd Comm's*). There, this Court expressly reaffirmed the principle in *Ross* that "the immunity conferred on governmental agencies is broad, and the statutory exceptions thereto are to be narrowly construed." Specifically, the *Nawrocki* court emphasized that the purpose of its earlier opinion in *Ross* was to create a "cohesive, uniform, and workable set of rules which will readily define the injured parties' rights and the governmental agency's liability." *Nawrocki*, 463 Mich App at 148-149. This Court specifically observed that the failure to consistently follow *Ross* "has precipitated an exhausting line of confusing and contradictory decisions" which have created a "rule of law that is virtually impenetrable, even to the most experienced judges and legal practitioners." *Id.* at 149. Accordingly, the *Nawrocki* Court "return[ed] to a narrow construction of the highway exception predicated upon a close examination of the statute's plain language, rather than merely attempting to add still another layer of judicial laws to those interpretations of the statute previously issued by [the Supreme Court] and the Court of Appeals." *Id.* at 150. This Court acknowledged that it would be impossible to avoid overruling some precedent, but nevertheless concluded that it was "duty bound to overrule past decisions that depart from a narrow construction and application" of the immunity statutes. *Id.* at 151.

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<sup>7</sup> There are many examples of recent cases adhering to *Ross*. For instance, in *Wade v Dep't of Corrections*, 439 Mich 158; 483 NW2d 26 (1992), this Court "reconsidered" the scope of immunity and noted that pre-*Ross* cases finding liability for conditions adjacent to public buildings no longer controlled. See also *Suttles v Dep't of Transp*, 457 Mich 635, 641; 578 NW2d 295 (1998); *Horace v Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998); and *Reardon v Dep't of Mental Health*, 430 Mich 398, 412-413; 424 NW2d 248 (1988).

*Ross* and its progeny, including *Nawrocki*, post-date *Hobbs*, *Reich*, and *Carver*, all of which had applied liberal statutory interpretation, grafting language onto notice provisions to avoid their literal application. *Hobbs*, *Reich*, and *Carver* all seemed tied to the sentiment expressed by the *Carver* majority that “frankly” notice statutes “are not looked upon with favor by us.” 390 Mich at 99.

*Ross* is fundamentally contrary to *Hobbs*, *Reich*, and *Carver*. *Ross* requires focus upon the statutory language and strict application of it. *Ross* respected the authority and judgment of the Legislature in its expressions of governmental immunity and the narrowly drawn exceptions to it. *Ross* rejects the sort of judicial legislation found in those earlier cases. The holding in *Ross* therefore compels application of the 120-day notice provision as written and adopted by the Legislature.

4. **There Is No Constitutional Need to Graft a Requirement For Actual Prejudice Onto the Notice Provision.**

a. **Plaintiff Has No Common Law Cause of Action.**

A county road commission has no common-law duty regarding the maintenance or repair of public roads. In *Roberts v Detroit*, 102 Mich 64, 66; 60 NW 450 (1894), this Court held:

Municipal corporations, in Michigan, are liable for injuries resulting from their neglect to repair public highways only where made so by statute. That there is no common-law liability was decided in the case of *City of Detroit v Blackevy* (1870), 21 Mich 84, which was a crosswalk case. It was followed by *McCutcheon v Village of Homer* (1880), 43 Mich 483. The earlier case contains an exhaustive discussion of the subject, holding that the duty of cities to repair highways is a public one, and that a private action does not lie for negligence in such cases. Subsequently, a statutory liability was created, and it is under this statute that the plaintiff must recover, if at all.

*Roberts*, 102 Mich at 66. See also *Gunther v Co Rd Comm'rs of Cheboygan Co*, 225 Mich 619, 628-629; 196 NW 386 (1923).

As repeated by this Court in *Longstreet v County of Mecosta*, 228 Mich 542, 551; 200 NW 248 (1924):

This brings us to the last question in this case, i.e., whether liability exists against the County. That the construction and maintenance in public highways is the discharge of a governmental function, for the improper discharge of which no liability exists except as created by statute, is the settled law of this state . . . .

*Id.* at 551 (internal citation omitted). In *Goodrich v County of Kalamazoo*, 304 Mich 442, 445; 8 NW2d 130 (1943), the Court again stated:

It must be noted that liability of defendant County for defects in a county road is a liability imposed only by statute [statutory reference omitted]. There is no common law liability.

“We have frequently held that liability of municipalities (counties) for injuries upon highways is purely statutory, and in derogation of the common law, and cannot be enlarged by construction.” *Brown v Twp of Byron*, 189 Mich 584.

*Goodrich*, 304 Mich at 445.

In short, there is no “common law” cause of action which emasculates or otherwise circumvents the explicit statutory restrictions, limitations, or prerequisites to suits against public road authorities.

b. **The Plaintiff’s Sole Cause of Action is Statutory, and the Legislature Has Authority to Create the Terms and Restriction of the Cause of Action**

The Legislature is not constitutionally obligated to provide any cause of action against a governmental road agency. This principle was affirmed in *Braun v County of Wayne*, 303 Mich 454, 457-458; 6 NW2d 744 (1942):

That the construction and maintenance of public highways is the discharge of a governmental function, for the improper discharge of which no liability exists except as created by statute, is the settled law of this State.

*Id.* at 457-458 (internal citations omitted).

Because the State has the inherent power to determine whether, and under what circumstances, it is subject to suit, it may also specify, by statute, the conditions for commencing an action. In creating a right to recover, the Legislature may restrict the exercise of that right. *Bement v Grand Rapids & Ind R Co*, 194 Mich 64; 160 NW 424 (1916). In *Bement*, this Court addressed whether the plaintiff's claim was barred pursuant to a unique two-year limitation period contained in section 6 of the federal Employers' Liability Act, 35 U.S. Stat 65. This Court observed:

The act in question creates a liability where none existed, and takes away defenses formerly available. Coupled with this enlargement of the liability of common carriers is the limitation that no action shall be maintained under the act "unless commenced within one year from the time the cause of action accrued." The ordinary statute of limitations confers upon a defendant the privilege of interposing a definite limitation of time as a bar to the enforcement of a liability existing independently of the statute defining the limitation. Such statutes, therefore, are merely limitations of the remedy. Statutes like the present are more. They create a right of action conditioned upon its enforcement within the prescribed period. *The Legislature, having the power to create the right, may affix the conditions under which it is to be enforced, and a compliance with those conditions is essential.* "The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. . . . Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are therefore to be treated as limitations of the right."

*Id.* at 66-67 (quoting *The Harrisburg*, 119 US 214; 7 S Ct 140; 30 L Ed 362) (overruled on other grounds by *Moragne v States Marine Lines, Inc*, 398 US 375; 90 S Ct 1772; 26 L Ed 2d 339 (1970)). Similarly, in *Manion v Michigan*, 303 Mich 1, 20; 5 NW2d 527 (1942), this Court held:

The terms of the state's consent to be sued in any court defines that court's jurisdiction to entertain the suit.

Therefore, the failure to follow the terms and conditions of the State's consent to be sued, as codified in the Governmental Tort Liability Act, negates the State's consent and therefore defeats jurisdiction over the subject matter of the claim.

A number of cases have recognized the Legislature's authority to enact notice as a precondition to exercise of a statutory remedy. In *Braun v County of Wayne, supra*, the plaintiff failed to comply with the applicable notice statute. Given the absence of any common law liability, failure to comply with the notice precondition for the statutory claim mandated dismissal. The Court recognized the Legislature's authority to set terms and conditions of the statutory claim, including notice:

There is imposed on the board of road commissioners the duty of keeping this road "in reasonable repair" so that it shall be "reasonably safe and convenient for public travel." 1 Comp Laws 1929, § 3996.

"That the construction and maintenance of public highways is the discharge of a governmental function, for the improper discharge of which no liability exists except as created by statute, is the settled law of this State (*Gunther v Cheboygan Co Rd Comm'rs*, 225 Mich 619), where the authorities are reviewed at length. *Longstreet v County of Mecosta*, 228 Mich 542, 551."

The rule stated in *Manion v State of Michigan*, ante, I, that "the terms of the State's consent to be sued in any court defined that court's jurisdiction to entertain the suit" applies equally well to actions against counties engaged in the discharge of governmental functions.

*Braun*, 303 Mich at 457-458.

It is significant to note that the comprehensive statutes which define and limit the liability of public road authorities were not disturbed by the Court's decision in *Williams v Detroit*, 364 Mich 231; 111 NW2d 1 (1961). Although the Court overruled the judicial doctrine of governmental immunity applicable to municipal corporations, it recognized the Legislature's inherent authority to act as it sees fit. The *Williams* Court sanctioned specific procedural and substantive statutory defenses, stating:

There is, of course, no doubt of legislative authority to act in this area. The Michigan Legislature may, if it sees fit to do so, re-institute governmental tort immunity by statute. Or, as it has already done in some instances, it may specify the terms and conditions of suit. Our holding in this case does not affect any

existing statute in the field concerned, or imply any limitation on legislative power to act where to date it has not acted.

*Williams*, 364 Mich at 260-261.

In summary, the Legislature has authority to set the terms and conditions of suit, where the plaintiff's claim exists solely by permission of the Legislature. In the context of a defective highway claim, the Legislature has expressly and unambiguously required notice within a specified time as a precondition to recovery. It is within the Legislature's province to create such a precondition, and having done so, it must be enforced as it is written.

c. **The Constitutional Underpinnings For *Hobbs*'s "Actual Prejudice" Requirement Are Illusory**

In *Hobbs v State Highway Dep't*, 398 Mich 90 (1976), this Court recognized that no actual prejudice requirement appeared within the statute, but nevertheless held: "Actual prejudice to the state due to lack of notice within 120 days is the only legitimate purpose we can posit for this notice provision. . . ." *Id.* at 96. Undergirding this decision was the Court's observation, through its discussion of *Reich v State Highways Dep't*, 386 Mich 617 (1972), that it would be unconstitutional to treat those injured by government tortfeasors differently than those injured by private tortfeasors. *Id.* at 95. Nevertheless, rather than invalidating the 120-day notice requirement entirely, the Court "invented" the actual prejudice requirement.

Since *Hobbs*, however, the legal landscapes of statutory interpretation in governmental immunity have come into sharper focus. In *Nawrocki*, as discussed above, this Court held with crystal clarity that:

[w]hen reviewing questions of statutory construction, our purpose is to discern and give effect to the Legislature's intent. *Murphy v Michigan Bell Tele Co*, 447 Mich 93, 98; 523 NW2d 310 (1994). We begin by examining the plain language of the statute. It is a fundamental principle of statutory construction that the words used by the Legislature shall be give their common and ordinary meaning, and only where the statutory language is ambiguous may we look outside the statute to ascertain the Legislature's intent.

*Nawrocki*, 463 Mich at 158. Equally importantly, since *Hobbs* this Court has backed away from its position that private and public tortfeasors must be treated identically. To the contrary, this Court has now held that there *are* compelling reasons to distinguish between governmental and private tortfeasors, and that the government *must* be treated differently:

Government cannot merely be liable as private persons are for public entities are fundamentally different from private persons. Private persons do not make laws. Private persons do not issue and revoke licenses to engage in various professions and occupations. Private persons do not quarantine sick persons and do not commit mentally disturbed persons to involuntary confinement. Private persons do not prosecute and incarcerate violators of the law or administer prison systems. Only public entities are required to build and maintain thousands of miles of streets, sidewalks, and highways. Unlike many private persons, a public entity cannot often reduce its risk of potential liability by refusing to engage in a particular activity, for government must continue to govern and is required to furnish services that cannot be adequately provided by any other agency. Moreover, in our system of government, decision-making has been allocated among three branches of government—legislative, executive, and judicial—and in many cases decisions made by the legislative and executive branches should not be subject to review in tort suits for damages, for this would take the ultimate decision-making authority away from those who are responsible politically for making the decisions.

*Ross v Consumers Power*, 420 Mich at 618-619.

Therefore, the construction of the Governmental Tort Liability Act offered in *Ross v Consumers Power*, and specifically that governmental tortfeasors must be treated differently than private tortfeasors, is antithetical to the rationale of *Hobbs* that public and private tortfeasors must be treated equally.

Therefore, the apparent constitutional underpinnings of the *Hobbs* case were eviscerated by *Ross*. In light of *Ross*, which has been reaffirmed repeatedly in this Court's recent jurisprudence, the *Hobbs* requirement of "actual prejudice" makes absolutely no sense from a constitutional perspective.

d. **Other Jurisdictions Apply Similar Notice Provisions Without Modification**

Courts in other jurisdictions have enforced statutory notice provisions without judicial modification. These courts have determined that their respective notice provisions are constitutional and can be applied because the Legislature, in granting a statutory right to sue, can set forth terms and conditions to suit. *Norton v City of Pomona*, 5 Cal 2d 54, 64; 53 P2d 952, 956 (S Ct of Cal 1935) (90-day general notice statute); *King v City of Boston*, 15 NE2d 191, 193 (S Ct of Mass 1938) (30-day highway notice statute); *Shields v State Hwy Comm*, 286 P2d 173, 176 (S Ct of Kan 1955) (90-day highway notice statute); *Barroso v Pepin*, 261 A2d 277, 279 (S Ct of RI 1970) (60-day notice statute); *Newlan v State*, 96 Idaho 711; 535 P2d 1348, 1353 (S Ct of Idaho 1975) (general 120-day notice statute); *Besette v Enderlin School Dist*, 288 NW2d 67 (S Ct of ND 1980) (90-day notice statute); *Budahl v Gordon & David Ass'n*, 287 NW2d 489 (S Ct of SD 1980) (60-day notice statute); *Warkentin v Burns*, 610 A2d 1287, 1289-91 (S Ct of Conn 1992) (90-day highway notice statute); *Johnson v Maryland State Police*, 331 Md 285; 628 A2d 12, 164 (Ct of App Md 1993) (180-day notice statute); *Marrujo v New Mexico State Hwy Transp Dep't*, 887 P2d 747, 752 (S Ct of NM) (six-month notice statute).

e. **Notice Within a Specified Time, as a Condition for Liability, Serves Legitimate and Important Functions**

In *O'Brien v Hazelet & Erdal*, 410 Mich 1; 299 NW2d 336 (1980), the Court observed that legislative acts will withstand a constitutional challenge "if supported by any state of facts either known or which can reasonably be assumed." 410 Mich at 1, 17. A "legislative classification" will not be "set aside if any state of facts reasonably may be conceived to justify it." 410 Mich at 1, 17.

Notice serves legitimate and important purposes. As this Court has recognized:

It cannot be overlooked that no private party has a potential tort responsibility comparable to that of the government for injuries allegedly caused by defective or unsafe conditions of highways.<sup>8</sup>

*Forest v Parmalee*, 402 Mich 348, 360; 262 NW2d 653 (1978).

One purpose of statutory notice provisions is to facilitate a timely investigation. *Swanson v City of Marquette*, 357 Mich 424, 431; 98 NW2d 574 (1959). Notice statutes provide "an opportunity to investigate the claim while the evidentiary trail is still fresh."<sup>9</sup> *Hussey v Muskegon Heights*, 36 Mich App 264, 267-268; 193 NW2d 421 (1971).

Additional legitimate purposes have been recognized. Notice of claim serves the purpose of providing a prompt opportunity to "remedy the defect before other persons are injured."

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<sup>8</sup> The Court cited Cooperrider, *The Court, The Legislature, and Governmental Tort Liability in Michigan*, 72 Mich L Rev, 267-275 (1973). Indeed, Professor Cooperrider's analysis is directly on point:

"Taking into account the extent of the governmental unit's liability exposure where public ways and public buildings are concerned, and the difficulties in keeping in current touch with all those conditions that might become a source of liability, surely there is nothing constitutionally unreasonable about a notice requirement that is not applicable to other tort feasons and other claimants."

Mich L Rev, at 272.

<sup>9</sup> Appellate courts have applied notice provisions in other situations where the need for timely notice is no greater than the need which applies to public road authorities. For example, in *Brown v Jo Jo-Ab Inc*, 191 Mich App 208; 477 NW2d 121 (1991), the Court of Appeals affirmed summary disposition based on the 120-day-notice requirement contained in the Dram Shop statute, MCL 436.22(5). The Court rejected plaintiff's contention that "defendant must show prejudice." In the words of the Court:

Plaintiff also urges that we should interpret this statute to require that defendant must show prejudice before being able to prevail on the notice defense. We disagree. When the language of the statute is clear and unambiguous, judicial construction is neither required nor permitted. *Osner v Boughner*, 180 Mich App 248, 268; 446 NW2d 873 (1989). Furthermore, the courts may not speculate with regard to the probable intent of the Legislature beyond the words employed in the statute.

*Brown*, at 211-212. See also, *Square D v Aero Mechanical*, 119 Mich App 740, 743; 326 NW2d 629 (1982) (holding that the notice requirements contained in the Michigan Public Works Bond

*Hussey*, 36 Mich App 264, 268. Notice provisions generally “are designed inter alia to provide time to investigate claims and to appropriate funds for settlement purposes.” *Davis v Farmers Ins*, 86 Mich App 45, 47; 272 NW2d 334 (1978).

Additionally, the 120-day notice requirement at issue in this case provides a mechanism whereby the road authority has the option of not only discovering facts, but securing evidence and otherwise “locking in” plaintiff’s version of events while his “memory” is “more precise.” The statute specifically allows the chief administrative officer to “require” the claimant and his witnesses to appear and testify under oath. MCL 691.1404(2); MSA 3.996(104)(2).

It has long been recognized that the opportunity to secure prompt statements is important, and that parties sustain undue hardship” when precluded from the opportunity to obtain such statements. See e.g. *Peters v Gaggos*, 72 Mich App 138; 249 NW2d 327 (1976). Indeed, in *Peters* the Court concluded that depositions are no substitute for timely statements:

[T]he requisite necessity or cause for the production of a statement is established when it was taken shortly after the event which it covers and, because of the passage of time, the memory of the witness at the time he gave the statement is likely to have been more precise than at the time discovery is sought; statements taken close to the event ‘are unique in that they constitute the immediate impression of the facts \* \* \* there can be no duplication by a deposition that relies upon memory, and an allegation of these facts, uncontroverted, is a sufficient showing of good cause.

*Peters*, 72 Mich App at 148 (quoting from *Powers v City of Troy*, 28 Mich App 24, 39-40; 184 NW2d 340 (1970)).

Presumably, the Legislature has recognized the inherent difficulty of establishing whether a delay in notice compromised an opportunity to respond to a claim. Indeed, this Court has

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Act MCL 129.207; MSA 5.2321(7); (30 days and 90 days) survived a constitutional challenge in a case where it was “stipulated” there was no actual knowledge and prejudice).

recognized that there is a presumption of prejudice when timely notice is required by contract or by statute. *Wehner v Foster*, 331 Mich 113; 49 NW2d 87 (1951).

In *Wehner*, the Court recognized that an insurance company benefits from a presumption of prejudice in a situation where timely notice is required. The Court also recognized that the lapse of time may serve to frustrate the possibility of demonstrating prejudice. On this point the Court quoted the following language, with approval: "the lapse of time which removes the opportunity for prompt investigation, also destroys the possibility of showing prejudice arising from delayed inquiry." *Wehner*, at 120 quoting from *Purefov v Automobile Indemnity Exchange*, 5 Cal 2d 81 (53 P2d 155).

Moreover, the legitimate purpose of the notice requirements is served by the Legislature setting a 120-day time limit. There was no reason to conclude, as the Court did in *Hobbs*, that "[b]ecause actual prejudice to the state due to lack of notice within 120 days is the only legitimate purpose we can posit for this notice provision, absent a showing of such prejudice the notice provision \* \* \* is not a bar to claims."

A dissent by Justice Brennan in the *Carver*, *supra* case reveals the fatal shortcomings in that reasoning. After noting that the majority opinion in *Carver* required the proponent of the notice provision to show actual prejudice to invoke its sanctions, Justice Brennan wrote:

The statute requires that a notice of claim be made to the Secretary of State within six months of the date of the cause of action.

The statute says that no recovery may be had from the Fund unless the notice is given.

Our court declines to hold that the statute is unconstitutional. But we go on to say that this constitutionally valid and plainly stated requirement for a notice of claim within six months, does not really mean what it clearly says.

The secretary will have to show, on a case-by-case basis that the Fund has been somehow prejudiced by each individual failure to give the required notice.

Now the curious thing is that while the court has conceded that there are – or at least there may be – valid reasons for the requirement of notice, that requirement is not binding in any case where the reason do not directly apply. The rationale of the court displays a total disregard for the fundamental power of the legislature to make binding, uniform rules of human conduct. By the reasoning in this case, it may fairly be concluded that no law is binding upon any citizen unless he or she may be found guilty of the mischief intended to be avoided by the adoption of the law.

Thus, a statute prohibiting motorists from proceeding through red lights is a valid exercise of the police power, founded in reason and logic and designed to move traffic and prevent collisions between vehicles approaching intersections from different directions. Under the rule of the case before us, the citizen has committed no offense unless, by proceeding through a red light he has interfered with traffic coming from the other direction.

Endless other examples come to mind.

Statutory law must always be expressed in terms clearly defining the conduct which is prohibited or required.

The power to legislate necessarily includes the power to declare the boundaries of prohibited or required conduct.

Moreover, legislation which does not declare such boundaries is constitutionally infirm. Citizens must be able to know what their legal rights and duties are.

By the rule of the case decided here, a claim against the Uninsured Motorists Fund is not barred Per se by failure to give the notice, but only by Prejudicial failure to give notice. Further, our decision does not even create a presumption of prejudice from failure to give notice. The secretary is put to the burden of proof to show that prejudice has in fact occurred.

Our decision emasculates the statutory notice requirement. The court's candor in conceding distaste for time limitations is no justification for judicial legislation.

*Carver*, at 101-103.

The Legislature chose to impose a definite deadline, 120 days. In doing so, it made a judgment of the time within which notice could be given without undue prejudice. Conversely, it judged that notice given after 120 days results in undue prejudice. By imposing and applying a set time limit, without the defendant needing to prove actual prejudice in a given case, the

Legislature has avoided the impossibility of the defendant's needing to prove what evidence has been lost by the delay.

F. Stare Decisis Is No Obstacle to Overturning Hobbs's Erroneous Construction of MCL 691.1404

In its March 31, 2006 Order granting the defendant's application for leave to appeal, this Court specifically directed that the parties address what effect, if any, the doctrine of *stare decisis* should have on the resolution of this case. Although *stare decisis* is a venerable doctrine that should be considered anytime this Court undertakes to overturn its earlier precedent, the circumstances surrounding this case lead to the conclusion that *stare decisis* do not preclude this Court from overturning *Hobbs*, thereby honoring the principles of *Ross* and restoring consistency to the law in this area.

1. The Doctrine of Stare Decisis

*Stare decisis* is the notion that a court of last resort should adhere to its prior decisions unless they are clearly wrong, *Petrie v Curtis*, 387 Mich 436, 439; 196 NW2d 761 (1972), or unless persuasion gives the court an abiding conviction that some unquestionably better rule should be followed, *Abendschein v Farrell*, 382 Mich 510, 516; 170 NW2d 137 (1969), *overruled on other grounds*, *Farrell v Ford Motor Co*, 199 Mich App 81; 501 NW2d 567 (1993).

Stated slightly differently, the doctrine of *stare decisis* is not necessarily controlling if there has been demonstrable error in prior decisions. *Womack v Buchhorn*, 384 Mich 718, 724; 187 NW2d 218 (1971). A court is not obligated to perpetuate error simply because it reached a wrong result in one of its earlier decisions. *Petrie*, 387 Mich at 439. Nor does the fact that the Legislature has, for a number of years, failed to correct this Court's misconstruction of a statute

preclude the Court from correcting the error. *Park v Appeal Bd of Mich Employment Sec Comm'n*, 355 Mich 103, 139-140; 94 NW2d 407 (1959).

Recently, this Court has examined the doctrine of *stare decisis* in the context of correcting a misreading of the governmental immunity statutes. In *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000), this Court considered the parameters of civil liability for governmental agencies and police officers when a police chase results in injuries or death to a person other than the driver of the fleeing vehicle. In so doing, the Court needed to reexamine its prior holdings in *Fiser v Ann Arbor*, 417 Mich 461; 339 NW2d 413 (1983) and *Rogers v Detroit*, 457 Mich 125; 579 NW2d 840 (1998).

In *Fiser*, the Court had held that “the excessive speed of the fleeing vehicle could be said to have resulted from the fact that the driver was being pursued by the police and that it was this high speed that caused the fleeing driver to lose control.” *Robinson*, 462 Mich at 446 (citing *Fiser*, 417 Mich at 475). In *Rogers*, the Court had held that it was a jury determination whether “the actions of the police officers in operating the pursuing vehicles were causes in fact of the plaintiff’s injuries, i.e., the jury could effectively conclude that the police were causing the flight. (*Id.* at 447) (citing *Rogers*, 457 Mich at 129). In other words, the *Rogers* majority reaffirmed *Fiser* and expanded it by holding that the municipal defendants “could be held liable for their officer’s decision to commence pursuit or to continue the pursuit. (*Id.*) (citing *Rogers*, 457 Mich at 143-145).

In *Robinson*, this Court overruled both *Fiser* and *Rogers*. The Court specifically noted that *Fiser* was decided before the Court’s “seminal governmental immunity opinion” in *Ross*, where the Court had held that the statutory exceptions to governmental immunity must be narrowly construed. The *Robinson* Court noted that prior to *Ross*, the Court had given the

exceptions broad readings. Noting that after *Ross*, earlier cases which had given the immunity exceptions broad readings were no longer good law, the Court concluded that *Fiser* and *Rogers* must meet a similar fate, because although they may have been proper when decided, they did not survive *Ross*.

Specifically addressing *stare decisis*, the Court noted that it had given serious consideration to the doctrine:

Stare decisis is generally “the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and precedent integrity of the judicial process.”

*Id.* at 463 (quoting *Hohn v United States*, 524 U.S. 236, 251; 118 S. Ct. 1969; 141 L. Ed. 2d 242 (1998)). Nevertheless, the Court concluded that *stare decisis* must not be applied mechanically “to forever prevent the Court from overruling earlier erroneous decisions determining the meaning of statutes.” *Id.* (citing *Holder v Hall*, 512 U.S. 874, 944; 114 S. Ct. 2581; 129 L. Ed. 2d 687 (1994)). The Court also noted that it “will not close its eyes to a possible error it may have committed in the past.” *Id.* at n22 (quoting *Wilson v Doepler-Jarvis*, 358 Mich 510, 514; 100 NW2d 226 (1960)). Moreover, the Court has no obligation “to perpetuate errors simply because it may have reached a wrong result in one of its earlier decisions. Thus, the doctrine of stare decisis does not tie the law to the past, wrongly decided cases solely in the interest of stability and continuity.” *Id.* at n22.

The Court laid a groundwork of numerous factors to be considered before overruling a prior case:

“For example, *Helvering v Hallock*, 309 U.S. 106, 119, 60 S. Ct. 444, 84 L. Ed. 604 (1940), states:

[S]tare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when

such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.

We must also recognize that stare decisis is a "principle of policy" rather than "an inexorable command," and that the Court is not constrained to follow precedent when governing decisions are unworkable or are badly reasoned.

\* \* \*

Courts should also review whether the decision at issue defies "practical workability," whether reliance interests would work an undue hardship, and whether changes in the law or facts no longer justify the questioned decision. See, e.g., *Planned Parenthood v Casey*, 505 U.S. 833, 853-856, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).

The first question, of course, should be whether the earlier decision was wrongly decided. . . .

However, as this discussion makes clear, the mere fact that an earlier case was wrongly decided does not mean overruling it is invariably appropriate. Rather, the Court must proceed on to examine the effects of overruling, including most importantly the effect on reliance interests and whether overruling would work an undue hardship because of that reliance.

\* \* \*

As to the reliance interest, the Court must ask whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations. It is in practice a prudential judgment for a court.

\* \* \*

[I]t is well to recall in discussing reliance, when dealing with an area of the law that is statutory (which *Fiser/Rogers* and *Dedes* do), that it is to the words of the statute itself that a citizen first looks for guidance in directing his actions. This is the essence of the rule of law; to know in advance what the rules of society are. Thus, if the words of the statute are clear, the actor should be able to expect, that is, rely, that they will be carried out by all in society, including the courts. In fact, should a court confound those legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest. When that happens, a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction. The reason for this is that the court in distorting the statute was engaged in a form of judicial usurpation that runs counter to the bedrock principle of American constitutionalism, i.e., that the lawmaking power is reposed in the people as reflected in the work of the Legislature, and, absent a constitutional violation, the courts have no legitimacy in overruling or nullifying

the people's representatives. Moreover, not only does such a compromising by a court of the citizen's ability to rely on a statute have no constitutional warrant, it can gain no higher pedigree as later courts repeat the error.

*Robinson*, 462 Mich at 464-469. See also, *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005) (noting that the [overturned] *Lewis* decision did not reflect a simple "misunderstanding" of the statute at issue; rather, the *Lewis* decision demonstrated an act of judicial defiance in which the Supreme Court substituted its own judgment concerning "fairness" for the plainly expressed will of the legislature—an action that should not be preserved by *stare decisis*).

## 2. Applying These Principles Here, *Stare Decisis* Does Not Insulate *Hobbs*

Applying the *Robinson* framework to the issue here, it is evident that *stare decisis* does not prevent this Court from overturning the "actual prejudice" requirement of *Hobbs*. First, the practical workability of the *Hobbs* "actual prejudice" requirement must be questioned. Placing the burden on a road agency to show actual prejudice requires that agency to demonstrate in a palpable manner that some change to the condition of the highway has prevented it from gathering and preserving the evidence necessary to prepare its defense. However, in many cases this is simply not possible because the exact condition of the highway at the time of the injury was never documented due to the lack of timely or substantively meaningful notice. In other words, it is easy to see how road agencies can be caught in the impossible conundrum of having to show a change in the highway condition that prejudices their ability to defend themselves, where it can never be known what condition the road was in at the time of the injury. By preventing road agencies from document highway conditions at or near the time of an injury, this rule promotes uncertainty in litigation by ensuring that cases will be litigated on less than the best evidence, and assuredly increases a road agency's exposure to liability.

Second, the reliance interests present in this issue would not work an undue hardship on plaintiffs. *Robinson* is directly on point:

it is well to recall in discussing reliance, when dealing with an area of the law that is statutory . . . that it is to the words of the statute itself that a citizen first looks for guidance in directing his actions. This is the essence of the rule of law; to know in advance what the rules of society are. Thus, if the words of the statute are clear, the actor should be able to expect, that is, rely, that they will be carried out by all in society, including the courts. *In fact, should a court confound those legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest. When that happens, a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconception.*

*Robinson*, 426 Mich at 467 (emphasis added). Additionally, it is difficult to conceive that a plaintiff, in reliance on *Hobbs*, would intentionally refrain from providing notice to a road agency with the 120-day period. This would be a risky proposition indeed, inasmuch as some event may occur that would allow the defendant to show "actual prejudice" under the rule in *Hobbs*, thereby barring the plaintiff's claim. Stated differently, the reliance interest involved here is minimal because rational plaintiffs simply would not intentionally rely upon *Hobbs* as justification for their failure to provide the statutorily mandated notice. To the contrary, the only rational explanation for failing to supply the required notice is that the plaintiff is ignorant of the statutory requirement. This explanation, however, has nothing to do with any reliance on *Hobbs*.

Third, the final criteria discussed in *Robinson* is whether a change in the law or facts justifies departure from the earlier decision. There can be no question, as discussed at length above, that the change in the law (or perhaps more properly, the refocusing of the law on a narrow construction of the immunity exceptions) ushered in by *Ross*, militates for the rejection of *Hobbs*. Although it is true that *Brown* was decided after *Ross*, it is equally true that *Nawrocki* was decided after *Brown*. In light of *Nawrocki*, which expressly reaffirmed the principles of *Ross*, noting that many decisions in the interim had strayed from those principles, there can be no

doubt that the “judicial legislation” of *Hobbs* and *Brown* cannot co-exist with present-day immunity jurisprudence.

In summary, *stare decisis* is not an inexorable command and does not preclude this Court from correcting the misconstruction of § 1404 in *Hobbs*. To the contrary, the factors discussed in *Robinson* militate in favor of overturning *Hobbs*, suggesting that more harm will be done by leaving *Hobbs* in tact than will be done by establishing consistency and uniformity through deference to the principles espoused in *Ross*.

**G. Any Change In the Law Should Apply Retroactively**

In the March 31, 2006 Order granting defendant’s application for leave to appeal, this Court specifically directed the defendant to address whether any change in the law should be retroactive or merely prospective. Comparison of the circumstances presented here to this Court’s retroactivity jurisprudence mandates that any change in the law here be made retroactive to all pending cases in which a challenge to *Hobbs* has been raised and preserved.

**1. Retroactivity Jurisprudence**

The general rule is that judicial decisions are given full retroactive effect. *Pohutsky v Allen Park*, 465 Mich 675, 696; 641 NW2d 219 (2002) (citing *Hyde v Univ of Mich Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986)). However, this Court has noted that a more flexible approach “is warranted where injustice might result from full retroactivity.” *Id.* (citing *Lindsey v Harper Hosp*, 455 Mich 56, 68; 564 NW2d 861 (1997)). As an example, the Court has indicated that a holding “that overrules settled precedent may properly be limited to prospective application.” *Id.*

A court examines three factors to determine when a decision should *not* have retroactive application. *Id.* (citing *Linkletter v Walker*, 381 US 618; 85 SCt 1731; 14 LEd2d 601 (1965)). Those factors are: (1) the purpose to be served by the new rule; (2) the extent of reliance on the

old rule; and (3) the effect of retroactivity on the administration of justice. *Id.* (citing *People v Hampton*, 384 Mich 669, 674; 187 NW2d 404 (1971)). Additionally, this Court has recognized a threshold question of whether the decision clearly established a new principle of law. *Riley v Northland Geriatric Ctr (after remand)*, 431 Mich 632, 645-646; 433 NW2d 787 (1988) (citing *Chevron Oil v Huson*, 404 US 97, 106-107; 92 S Ct 349; 30 L Ed 2d 296 (1971)).

In *Pohutsky*, the Court faced whether the “plain language of § 7 of the Governmental Tort Liability Act, MCL § 691.1407, permits a trespass-nuisance exception to governmental immunity.” This Court held that because the Legislature’s definition of the word “state” is clear and unambiguous, it does not. *Id.* at 677. However, because the Court was mindful of the effect that its holding would have on the administration of justice, it concluded that the holding should be limited to prospective application.

Resolving first the threshold question noted in *Riley*, the Court held that although its opinion gave effect to the intent of the Legislature that may be reasonably inferred from the text of the governing statutory provisions, as a practical matter, the holding was akin to the announcement of a new rule of law given the erroneous interpretation set forth in earlier cases. *Id.* at 696-697.<sup>10</sup>

Having determined that the decision issued a new rule of law, the Court moved on to apply the three-part test. *Id.* at 697. Noting that the purpose of the new rule set forth in the opinion was to correct an error in the interpretation of Section 7 of the Governmental Tort Liability Act, the Court concluded that prospective application would further that purpose. *Id.* Second, the Court noted that there had been extensive reliance on *Hadfield*’s interpretation of Section 7 of the Governmental Tort Liability Act. *Id.* Additionally, the Court observed that

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<sup>10</sup> See also, *Gladych v New Family Homes, Inc*, 468 Mich 594; 664 NW2d 705 (2003).

many insurance decisions have undoubtedly been predicated upon the Court's longstanding interpretation of Section 7 under *Hadfield*: "Municipalities have been encouraged to purchase insurance, while homeowners have been discouraged from doing the same." *Id* Third, the Court noted that prospective application minimizes the effect of the decision on the administration of justice. *Id*

This Court specifically commented that its decision was strengthened by 2001 PA 222, which amends the Governmental Tort Liability Act to provide a remedy for damages or physical injuries caused by a sewage disposal system event. According to the Court, the amended statute does not contain any language indicating that it is meant to apply retroactively. *Id* at 698. The statute also provides a 45-day notice provision that a plaintiff must comply with before becoming entitled to relief. *Id* Because of this notice provision, and because the statute applied only prospectively, the Court observed that if its decision were to be given retroactive effect, a distinct class of litigants would be created who could not recover pursuant to the eradicated common law exception, but who also would not be able to satisfy the requirements of the statute. In light of those circumstances, the Court concluded that its decision should apply prospectively only.

In slight contrast to *Pohutsky*, in *County of Wayne v Hathcock*, 471 Mich 445; 684 NW2d 765 (2004), this Court determined that its prior decision in *Poletown Neighborhood Council v Detroit*, 410 Mich 616; 304 NW2d 455 (1981), was inconsistent with eminent domain jurisprudence and advanced an invalid reading of Michigan's Constitution. Therefore, the Court overruled the *Poletown* decision.

Addressing the retroactivity issue, the Court held that because *Poletown* itself "was such a radical departure from fundamental constitutional principles in over a century of this Court's eminent domain jurisprudence leading up to the 1963 Constitution," it was necessary to overturn

*Poletown* to vindicate the Constitution, protect the peoples' property rights, and preserve the legitimacy of the judicial branch as the expositor—not creator—of fundamental law. *Hathcock*, 471 Mich at 483. The Court acknowledged that “it is a certainty that state and local government actors have acted in reliance on its broad, but erroneous interpretation of art. 10, § 2.” *Id* Nevertheless, the Court saw no reason to “depart from the usual practice of applying our conclusions of law to the case at hand.” *Id.* at 484 (citing *Lesner v Liquid Disposal*, 466 Mich 95, 108; 643 NW2d 553 (2002)). The Court noted that its decision

does not announce a new rule of law, but rather returns our law to that which existed before *Poletown* and which has mandated by our Constitution since it took effect in 1963. Our decision simply applies fundamental constitutional principles and enforces the “public use” requirement as that phrase was used at the time our 1963 Constitution was ratified.”

*Id.* (internal footnotes omitted).

Additionally, in a series of footnotes this Court raised serious concerns about its ability to issue prospective-only opinions. First, the Court referred to Justice Cooley’s treatise, *Constitutional Limitations*, at 91, for the notion that the exercise of “judicial power” is concerned with a determination “of what the existing law is, even in ‘changing’ a mistaken interpretation, rather than making a ‘predetermination of what the law shall be for the regulation of all future cases,’ which is an act that ‘distinguishes a legislative act from a judicial one.’” *Hathcock*, 471 Mich at 484 n97. Second, the Court observed that “there is a serious question as to whether it is constitutionally legitimate for this Court to render purely prospective opinions . . . . The only instance in which we are constitutionally authorized to issue an advisory opinion is upon the request of either house of the Legislature or the Governor . . .” *Id.* at n98. Therefore, the Court applied the *Hathcock* decision overruling *Poletown* retroactively to all pending cases in which a challenge to *Poletown* had been raised and preserved. *Id.*

Similar to *Hathcock* is this Court's recent decision in *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005). In *Devillers*, the Court noted that prospective application "is a departure from [the usual rule of retroactive effect] and is appropriate only in 'exigent circumstances.'" *Devillers*, 473 Mich at 586 (citing *Wayne Co v Hathcock*, 471 Mich 445, 484; 684 NW2d 765 (2004)). The Court held that the *Devillers* case presented no "exigent circumstances" of the sort wanting the "extreme measure" of prospective application only. *Id.* (citing *Gladych v New Family Homes, Inc*, 468 Mich 594, 606 n6; 664 NW2d 705 (2003)). The *Devillers* court further held:

As we reaffirmed recently in *Hathcock*, prospective-only application of our decisions is generally "limited to decisions which overrule *clear and uncontradicted* case law." *Lewis* is an anomaly that, for the first time, engrafted onto the text of § 3145(1) a tolling clause that has absolutely no basis in the text of the statute. *Lewis* itself rests upon case law that consciously and inexplicably departed from decades of precedent holding that contractual and statutory terms relating to insurance are to be enforced according to their plain and unambiguous terms.

Thus, *Lewis* cannot be deemed a "clear and uncontradicted" decision that might call for prospective application of our decision in the present case. Much like *Hathcock*, our decision here is not a declaration of a new rule, but a return to an earlier rule and a vindication of controlling legal authority—here, the "one-year-back" limitation of MCL 500.3145(1).

*Id.* at 587 (internal footnotes and citations omitted). Accordingly, the Court in *Devillers* gave its holding full retroactive effect, meaning that it is applicable to all pending cases in which a challenge to *Lewis*'s judicial tolling approach has been raised and preserved. The Court noted that this form of retroactivity "is generally classified as 'limited retroactivity.'" *Id.* at 587 n57 (citing *Stein v Southeastern Mich Family Planning Project, Inc*, 432 Mich 198, 201; 438 NW2d 76 (1989)).

2. Application of These Principles Mandates That Any Change in the Law Here Be Retroactive

Application of this Court's retroactivity jurisprudence mandates that any change to the "actual prejudice" requirement of *Hobbs* be made retroactive. The threshold question is whether the decision clearly establishes a new rule of law. If it does not, then the analysis goes no further and the decision receives retroactive effect. *Pohutsky*, 465 Mich at 696-697. Here, any change to the "actual prejudice" requirement of *Hobbs* would not establish a new rule of law. Rather, just as in *Hathcock* and *Devillers*, the elimination of Hobbs's prejudice requirement would restore the law to its earlier state, where notice provisions were enforced without prejudice requirements. See footnote 3, *supra* (collecting cases).

Additionally, as noted in *Devillers* and *Hathcock*, prospective application is reserved for cases that overrule clear and uncontradicted case law. As held by a special conflict panel of the Court of Appeals,:

"Case law" is defined as "[t]he aggregate of reported cases as forming a body of jurisprudence, or the law of a particular subject as evidence or formed by the adjudged cases, in distinction to statutes and other sources of law." Black's Law Dictionary (4<sup>th</sup> ed). [A court] must focus [its] inquiry on the overall body of case law interpreting the highway exception to governmental immunity act rather than limit the focus [to the one decision which was overturned].

*Adams v Dep't of Transp*, 253 Mich App 431, 437; 655 NW2d 625 (2003). In other words, the standard for determining whether a judicial decision should be limited to prospective application would be rendered meaningless if a court simply asked whether the Supreme Court had overruled one of its prior opinions, standing alone, because in every case in which the Supreme Court overruled one of its prior decisions, the principle of law emanating from the more recent case would be applied only prospectively. *Id.* In *Adams*, the Court of Appeals held that given the fractured and "constantly evolving" nature of governmental immunity jurisprudence—and the express recognition of that confusing and often contradictory jurisprudence in cases like

*Nawrocki*—it cannot be maintained that any state of the law is “clear and uncontradicted.” *Id.* at 438 n5.

For these reasons, any change to the prejudice requirement of *Hobbs* would not create a new rule of law, nor would it overrule clear and uncontradicted case law. Any such change would therefore fall under the presumption of retroactivity.

Should this Court deem it necessary to address the three-pronged test, the circumstances of this case still warrant retroactive application. First, the purpose of the new rule would be to correct an erroneous construction of MCL 691.1404. Although it could be said, as in *Pohutsky*, that prospective application of this rule would further its purpose, it is equally evident that retroactive application would more completely further that purpose by allowing those defendants who have preserved and argued the issue to benefit from their efforts and to have the correct law applied to their cases. It certainly cannot be said that retroactive application would somehow hinder the purpose of correcting the bad law.

Second, as discussed above with regard to *stare decisis*, the extent of reliance on the old rule is minimal. The simple truth is that those who are aware of the notice requirement with its “prejudice add-on” are also aware that the failure to supply the notice within the specified time can still result in dismissal of the case if the road authority can show prejudice. A right-thinking plaintiff would not risk losing the cause of action on a gamble that the defendant will not be able to show prejudice. This situation is in stark contrast to the one presented in *Pohutsky*, for example. There, if the Court’s decision were made retroactive, a plaintiff with a vested cause of action who had simply not commenced suit might have lost that cause even though that plaintiff technically had done nothing wrong. In other words, that plaintiff—in planning when to commence suit—might have justifiably relied upon the common law trespass-nuisance exception

and its settled limitation period. No such claim can be made by a plaintiff who fails to provide the statutory notice; it is nonsensical to think that a plaintiff would “rely” on the *Hobbs* rule and fail to provide the required notice in the hope that the defendant would not be able to show actual prejudice.

Third, and finally, any change in the law would have no adverse effect on the administration of justice. There is no reason to think that lower courts would somehow become “bogged down” as a result of any change. To the contrary, if anything, the administration of justice would benefit from the restored consistency and uniformity to immunity jurisprudence.

In summary, the circumstances of this case do not warrant prospective-only application of any change in the law.

II. ALTERNATIVELY, THE UNTIMELY “ATTORNEY RETENTION” LETTER SENT BY PLAINTIFF’S COUNSEL WAS NOT ADEQUATE NOTICE PURSUANT TO MCL 691.1404 BECAUSE IT FAILED TO “SPECIFY THE EXACT LOCATION AND NATURE” OF THE DEFECT, THE INJURIES SUSTAINED, AND THE NAMES OF WITNESSES KNOWN AT THE TIME BY THE CLAIMANT.

A. Standard Of Review

The question presented here involves an issue of statutory interpretation. Matters of statutory interpretation are subject to *de novo* review. *Stozicki v Allied Paper Co*, 464 Mich 257, 263; 627 NW2d 293 (2001). Moreover, the issue presented here is a pure question of law which receives *de novo* review, as well. *Cardinal Mooney High School v Michigan High School Athletic Ass’n*, 437 Mich 75, 80; 467 NW2d 21 (1991). Finally, the trial court’s grant or denial of summary disposition is reviewed *de novo*. *Stone v Michigan*, 467 Mich 288, 291; 651 NW2d 46 (2002).

**B. The "Retention Letter" Sent To The Road Commission By Plaintiff's Counsel Fails To Satisfy Any Of The Substantive Criteria Of MCL 691.1404**

Irrespective of whether this Court overturns the "actual prejudice" requirement established in *Hobbs* and *Brown*, defendant Road Commission is entitled to summary disposition on the alternative basis that the purported notice sent by the plaintiff's counsel in this case did not comply with the substantive requirements of MCL 691.1404. The purported notice, which was no more than a notice that an attorney had been retained by the plaintiff, did not specify the exact location and nature of the defect, did not list the injuries sustained, and did not list the names of the witnesses known at the time by the claimant. Each of these items is required by the statute. The plaintiff's failure to provide the Road Commission with the required information is fatal to her claim.

On June 26, 2001, plaintiff's counsel sent a "retention letter" to the Road Commission. (Appx at 42a). That letter states:

Please be advised that I have been retained by Mr. [sic] Joanne Rowland to investigate and evaluate a claim for personal injuries that arose out of an incident that occurred on February 6, 2001. This incident occurred at the intersection of Jennings and Main Street in Northfield Township, County of Washtenaw, State of Michigan. Please be advised that I will continue my investigation and if the same is warranted, will pursue a claim for money damages against the responsible agency for jurisdiction of this roadway. If I do not hear from you in the near future, I will be forced to place this matter into litigation.

(Appx at 42a).

In this case, the Road Commission's only potential liability is pursuant to the GTLA "highway exception," MCL 691.1402. Unique to highway exceptions cases is the notice requirement established by MCL 691.1404. Depending on the claimant's age, the claimant has either 120 or 180 days to "serve notice on the governmental agency of the occurrence of the injury and the defects." MCL 691.1404(1). The notice "shall specify the exact location and

nature of the defect, the injuries sustained, and the names of the witnesses known at the time by the claimant.” *Id.*

In this case, the purported notice, which is in substance nothing more than a notice that an attorney has been retained by the plaintiff, wholly fails to satisfy the substantive requirements of MCL 691.1404(1). First, the letter does not specify the “exact location and nature of the defect.” As for the nature of the defect, the letter is entirely silent. It fails to identify any defect whatsoever, much less the exact nature of the defect. Rather, it refers only to an “incident” of some sort that occurred at the intersection of Jennings and Main Street. This incident could literally refer to any sort of accident, including one caused by a highway defect or a motor vehicle collision, or any other type of incident whatsoever. If the Road Commission were to assume that the “incident” referred to an accident involving a highway defect, the letter provides absolutely no indication what the supposed defect is. A pothole? A traffic signal? A vision obstruction? An edge drop? A low coefficient of friction? Cracking? Or something else entirely? This “retention letter” sent by plaintiff’s counsel cannot satisfy the statutory requirements because it fails to identify that the “incident” was caused by a highway defect, and further to identify what that defect is.

Second, the letter provides only very generalized information concerning the location of the “incident.” It does not, as required by the statute, describe the exact location of the defect. Case law from this Court has discussed notice in the context of a highway defect claim, albeit under a predecessor statute to the one at issue in this case. In *Barribeau v City of Detroit*, 147 Mich 119; 110 NW 512 (1907), this Court held:

The requirement that a notice be given is not alone for the purpose of affording the officers of the city opportunity for investigation. It is also for the purpose of confining the plaintiff to a particular “venue” of the injury. In determining the sufficiency of the notice, excepting perhaps as to the time of the injury, the whole

notice and all of the facts stated therein may be used and may be considered to determine whether it reasonably apprises the officer upon whom it is required to be served of the place and the cause of the alleged injury. The nature of the defect stated may aid in locating the place, and the place may be stated with such particularity that a very general statement of the defect (cause of the injury) may be aided. *Sargent v City of Lynn*, 138 Mass 599. ***But to be legally sufficient, a notice must contain a description of the place of the accident so definite as to enable the interested parties to identify it from the notice itself.*** *Benson v City of Madison*, 101 Wis 312, 77 NW 161; *Carr v Ashland*, 62 NH 665; *Larkin v City of Boston*, 128 Mass 521; *Rogers v Inhabitants of Shirley*, 74 Me 114; *Lee v Village of Greenwich*, 48 App Div 391, 63 NYS 160. . . . [W]hen parol evidence is required to determine both the place and the nature of the defect, a reasonable notice has not been given to the city.

*Id.* at 125-126 (emphasis added).

Similarly, in *Ridgeway v City of Escanaba*, 154 Mich 68; 117 NW 550, 551, this Court held:

Counsel urged that no description of the injury was necessary under the language of the statute, which he says mentions the extent of the injury, but not the nature, and he argues that this refers only to the amount of his claim. ***We do not so understand the statute, unless it is to be practically emasculated by construction. We must say that the Legislature intended to give to defendants in such cases some protection against unjust raids upon their treasuries by unscrupulous prosecution of trumped-up, exaggerated, and stale claims, by requiring a claimant to give definite information to the city or village against whom it is asserted, at a time when the matter is fresh, conditions unchanged, and witnesses thereto and to the accident within reach. It is a just law, necessary to the protection of the taxpayer, who bears the burden of unjust judgments. It requires only ordinary knowledge and diligence on the part of the injured and his counsel, and there is no reason for relieving them from the requirements of this statute that would not be applicable to any other statute of limitation.*** We have never held a notice ineffective when it could reasonably said to be in substantial compliance with the law, but we think that cannot be said of this notice.

*Id.* at 72-73.

In *Overton v Detroit*, 339 Mich 650; 64 NW2d 572 (1954), this Court concluded that the notice provided by the plaintiff was insufficient to satisfy the requirements of a predecessor statute to the one at issue here. In *Overton*, the plaintiff fractured her leg as she stepped from the street to the sidewalk near the corner of Bates and Larned Streets in the City of Detroit. She filed

a claim with the city the following day, establishing the location "at the sidewalk front of 28 E. Larned, corner of Bates." *Id.* at 651. Apparently, she did not describe the nature of the alleged defect. Almost two years later, however, she filed a declaration establishing the place of the injury in specificity: "immediately in front of the building located on the southwest corner of East Larned and Bates Street, in the City of Detroit, said building being commonly known as 28 East Larned Street, Detroit, Michigan." *Id.* at 651-652. She described the defect as follows: "Said sidewalk was broken near the curb of Bates Street and the depression existed thereon, especially within the center of an uncovered metal pipe approximately three inches in diameter." *Id.* at 651-652.

In examining the content of her initial notice to the city, this Court concluded that it failed to satisfy the statutory requirement:

The defect, if any, was comparatively easy to describe, and it is difficult to understand how appellee failed to make any reference to the location in the claim filed April 1, 1949, and that her signed statement of April 4, 1949, as later established by her testimony in March, 1953, that: "On Bates a little south of Larned, there is a pole and next to the pole there is a defect in the walk." Parol evidence was required in this case "to determine both the place and the nature of the defect" and, applying the test set forth in *Barribeau v City of Detroit, supra*, there is but one conclusion, namely: A reasonable notice was not given to the city.'

*Id.* at 659.

In this case, the exact location of the defect cannot be determined through reference to the notice itself. Although the letter identifies the intersection of Jennings and Main Street, it does nothing to inform the Road Commission whether the alleged defect existed within the paved surface of the highway, in the unpaved shoulder area, on top of the road surface, within the road surface, or any place at all. It does not identify which intersecting leg where the defect was alleged to have existed. In short, parol evidence is necessary to determine where this defect is

alleged to have existed. As such, the purported notice cannot pass the test of *Barribeau*, *Ridgeway* and *Overton*.

Third, absolutely nothing in the “retention letter” informs the Road Commission of the injuries sustained by the plaintiff, or of the identity of any witnesses known by the plaintiff. Nothing in the letter even arguably comes close to satisfying these statutory requirements. It would have been very easy for the plaintiff to provide this information, yet no effort whatsoever is made.

In summary, the “retention letter” does not inform the Road Commission of the exact nature and location of the defect. It does not inform the Road Commission that the plaintiff’s injury was alleged to have been caused by a road defect. Nor does it to identify the injury that was sustained by the plaintiff, nor provide the names of any witnesses known at the time by the claimant. The letter sent by plaintiff’s counsel therefore does not satisfy any of the mandatory substantive statutory requirements of MCL 691.1404(1), and on this basis, the Road Commission should have received summary disposition.

C. **Even If Actual Prejudice is Required, the Road Commission Can Satisfy This Standard Because It Did Not Have Proper Notice of the Exact Location and Nature of the Defect Until the Complaint Was Filed—After the Road Commission Had Resurfaced the Road.**

As an alternative, if a road commission is required to show actual prejudice before claiming dismissal for a faulty notice pursuant to MCL 691.1404(1), the Road Commission here can satisfy this standard. The Road Commission received the plaintiff’s “retention letter” on June 26, 2001. Shortly after receiving this letter, the road at issue was resurfaced.

In rejecting this argument by the defendant, the Court of Appeals held:

Defendant specifically claims that it did not have a reasonable opportunity to investigate the defect before it resurfaced the intersection. However, the notice was only 20 days late, and, in any event defendant did not resurface the

intersection until after it received the notice. Thus, untimely notice did not actually prejudice defendant.

(Appx 144a). What is ignored by the Court of Appeals is that the content of the notice did not satisfy the substantive requirements of MCL 691.1404. Without proper notice pursuant to the statute prior to repaving the intersection, the Road Commission can easily show “actual prejudice” as a result of the faulty notice because by the time it did receive the plaintiff’s complaint in 2003, it was unable to properly investigate the plaintiff’s allegations and preserve evidence necessary for its defense. This consequence is the very definition of prejudice, which refers to “a matter which would prevent the party from having a fair trial, or matter which he could not properly contest.” *Blohm v Emmet Co Bd of Co Rd Comm’rs*, 223 Mich App 383, 388; 565 NW2d 924 (1997) (citations omitted). The standard articulated by the Court of Appeals cannot stand because it places the nearly insurmountable burden on the defendant to take a generic notice and literally guess at the plaintiff’s theory, or alternatively to conduct an exhaustive investigation that scopes all possible theories which the plaintiff might ultimately rely upon. This burden is too great and will invariably lead to injustice any time a defendant guesses incorrectly, or is forced to spend precious time and resources attempting to investigate every conceivable theory. In any event, it ignores the language of the statute which places the burden of notice on the plaintiff.

On this alternative basis, the defendant should have received summary disposition.

**III. THERE IS NO GENUINE ISSUE OF MATERIAL FACT CONCERNING WHETHER THE ALLEGED DEFECT EXISTED WITHIN THE IMPROVED PORTION OF THE HIGHWAY DESIGNED FOR VEHICULAR TRAVEL.**

**A. Standard of Review**

The trial court’s grant or denial of summary disposition is reviewed *de novo*. *Stone v Michigan*, 467 Mich 288, 291; 651 NW2d 46 (2002).

**B. The Alleged Defect Was Not Within the Improved Portion of the Highway**

In the Circuit Court and the Court of Appeals, the defendant presented an issue unrelated to its notice arguments. Namely, defendant argued that the evidence does not create a genuine issue of material fact concerning whether the alleged defect that plaintiff alleges caused her injury existed within the “improved portion of the highway designed for public travel.” As an alternative basis to the notice arguments, defendant-appellant is entitled to summary disposition on this basis.

In *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143; 615 NW2d 702 (2000) (consolidated with *Evens v Shiawassee Co Rd Comm’s*), this Court held that the duty created under MCL 691.1402 with respect to the repair or maintenance of highways extends only to “the actual roadbed designed for vehicular travel.” In the appendix to those decisions, this Court stated:

The statutory highway exception imposes a duty on the state and county road commissions to repair and maintain “only . . . the improved portion of the highway designed for vehicular travel,” so that it is “reasonably safe and fit for travel.” MCL 691.1402(1); MSA 3.996(102)(1). Expressly excluded from this duty are “sidewalks, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel.” MCL 691.1402(1); MSA 3.996(102)(1).

Under the “any person” language of MCL 691.1402(1); MSA 3.996(102)(1), pedestrians fall within the general class of travelers protected by the highway exception.

The plain language of the highway exception definitively limits the state and county road commissions’ duty with respect to the location of the alleged dangerous or defective condition; if the condition is not located in the actual roadbed designed for vehicular travel, the narrowly drawn highway exception is inapplicable and liability does not attach. MCL 691.1402; MSA 3.996(102).

*Nawrocki*, 463 Mich at 185.

The Circuit Court did not specifically rule upon this argument by the Road Commission. Rather, it simply placed on the record its ruling regarding the Road Commission's notice arguments, and further added that "[f]or the reasons stated by the plaintiff in their [sic] brief and on the record, the defendant's motion is denied." (Appx at 100a).

The Court of Appeals did expressly address the argument, however. Nevertheless, it erred in holding that a question of fact existed as to where plaintiff-appellee fell:

Defendant also argues that it is immune from liability because the alleged hole that caused plaintiff to fall was not in the improved portion of the highway. The highway exception to government immunity "extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel." MCL 691.1402(1). The highway exception applies to injuries sustained in a crosswalk if the crosswalk happens to be within the improved portion of the highway. *Sebring v Berkley*, 247 Mich App 666, 680; 637 NW2d 552 (2001).

Defendant argues that plaintiff fell on the unimproved portion of the roadway because the pictures taken by the plaintiff's son show that the only place water accumulated was on the unimproved portion of the roadway. However, plaintiff testified during her deposition that the hole was in the crosswalk and part of the area she circled on defendant's photograph lies within the crosswalk. In addition, after looking at the photographs submitted by the parties, we conclude that reasonable minds could disagree on whether water had accumulated in the marked crosswalk. Because the facts regarding the location of the alleged hole are in dispute, we cannot determine at this time whether as a matter of law defendant is immune from liability on the ground that the alleged hole was not in the improved portion of the roadway. Therefore, the trial court correctly denied summary judgment on this basis.

(Appx at 145a).

With due respect to the Court of Appeals panel, the Road Commission submits that the lower court improperly stretched to find a question of fact where none existed, and improperly used inconsistencies in the plaintiff's own testimony to create a material issue of fact. Plaintiff-appellee testified that she tripped and fell in a water-filled "hole," a "big, deep place" in what she referred to as the crosswalk. (Appx at 58a). Despite the fact that much of plaintiff-appellee's

testimony is double-talk, or at least nearly so, it is important that she consistently testified that the alleged defect which caused her to trip was a large, muddy, water-filled hole:

Q. And you said that the hold is in the photograph, but you can't point it out because there is water in it, is that correct?

A. Yes.

(Plf's Dep. Trx. at 42). The only photographs of the condition of the crosswalk are those taken by plaintiff-appellee's son on or about February 8, 2001. Defendant-appellant Road Commission attached two of those photographs, showing the crosswalk and snow conditions, as Exhibits 8 and 9 to its Summary Disposition Brief. (Appx at 38a and 40a). Plaintiff-appellee filed three more photographs as her Exhibit B to her Response Brief in the Circuit Court. (Appx at 61a, 62a and 63a).

Contrary to the Court of Appeals' observation, it is clear from the photographs that there was no large hole in the paved crosswalk or in any other portion of the roadway that is visible within the photographs. These photos show accumulated water in only one area, that being adjacent to, but not on the paved road surface. Although plaintiff-appellee refers to this area as a crosswalk at points in her deposition, it would appear that what she is truly referring to is not a marked crosswalk on the paved roadway, which has no holes or standing water, but rather the unpaved area adjacent to the paved roadway, which she described in her deposition as follows:

Q This is the crosswalk coming across Jennings?

A. Here.

Q. Is this the water that you were telling me about?

A. Yep.

Q. Is the hole that you think you fell in in this picture?

A. It does not show right where I fell because it's all water. It was a great big huge place.

\* \* \*

Q. Can you tell me, is the sidewalk in any of these photographs?

A. I don't think there was any. I sort of see a hole there.

Q. I'm asking you is the sidewalk in any of these photographs?

MR. MCKENNA: You know the answer, there was no sidewalk.

A. Nothing but mud.

(Plf's dep transcript at 39-40).

It is clear that the plaintiff-appellee's allegation of a hole in the crosswalk at Jennings Road has no foundation in fact, and calling a muddy area adjacent to a crosswalk does not make the muddy area a crosswalk. For plaintiff-appellee to avoid governmental immunity, the alleged defect that resulted in her injury must be located in the actual roadway designed for vehicular travel. *Sebring v Berkely*, 247 Mich App 666; 637 NW2d 552 (2001). In *Sebring*, the Court of Appeals distinguished crosswalks on paved roads from ancillary installations such as pedestrian overpasses and sidewalks, reaffirming that county road commissions have no liability for the latter, but holding that there can be liability for defects within a paved crosswalk which is part of the "improved portion of the highway designed for vehicular travel." In so holding, the Court looked to the statutory definition of "crosswalk":

257.10 "cross-walk" means:

- (a) that part of a roadway at an intersection included within the connections of the lateral lines of the sidewalks on opposite sides of the highway measured from the curbs, or in the absence of curbs from the edges of the traversable highway.
- (b) any portion of a highway at an intersection or elsewhere distinctly indicated for pedestrian crossing by lines or other markings on the surface.

In her deposition testimony quoted above, plaintiff-appellee admitted there was no sidewalk leading up to the pavement; rather, the area where the water-filled "hole" was located

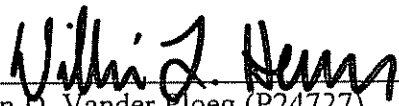
was "nothing but mud." Further, plaintiff-appellee's own photographs clearly show there is no "hole" in the road bed designed for vehicular travel, either within the painted crosswalk or elsewhere on the pavement. Rather, in the words of MCL 257.10, the area where plaintiff-appellee claims to have fallen was in an area without sidewalks, without curbs, and outside the edge of the traversable highway. It was not a cross-walk; rather, it was a muddy area adjacent to, but not part of the paved, "improved portion of the road bed designed for vehicular travel," and as such, fell outside any duty or liability under MCL 691.1402, and within defendant-appellant Road Commission's immunity.

For the foregoing reasons, plaintiff-appellee failed to create a genuine issue of material fact concerning whether the alleged defect comes within the narrow confines of MCL 691.1402. The defendant-appellant should have received summary disposition on this basis, and for the trial court and Court of Appeals to hold otherwise was error.

#### **RELIEF REQUESTED**

Wherefore, for the foregoing reasons and authorities, defendant-appellant Washtenaw County Road Commission respectfully requests that this Court **REVERSE** the lower court decisions, and thereby **GRANT** summary disposition to the Road Commission. Defendant-appellant further respectfully requests any additional relief deemed necessary, including but not limited to costs and fees incurred in this appeal.

DATED: May 26, 2006

  
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